No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C. SPARLING, as Superintendent of Banks of the State of California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

APPELLANTS' OPENING BRIEF.

EDMUND G. BROWN,
Attorney General,
WALTER L. BOWERS,
Assistant Attorney General,
BAYARD RHONE,
Deputy Attorney General,
217 West First Street,
Los Angeles 12, California,

Attorneys for the Appellants, the People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California.

Parker & Company, Law Printers, Los Angeles—Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES

TEXTBOOKS

No. 13119

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C. SPARLING, as Superintendent of Banks of the State of California,

Appellants,

vs.

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

This action involves the dispute between the parties as to whether a Federal savings and loan association organized for private profit and doing business in the State of California may lawfully hold itself out as a bank contrary to the laws of the State of California.

The People of the State of California and the Superintendent of Banks of the State of California filed an action in the Superior Court of the State of California in and for the County of Los Angeles to restrain the defendant and appellee from holding itself out as a bank contrary to the State Banking Code, and for penalties. [R. 9-22.] A petition for removal to the District Court,

Southern District, Central Division, was made on the basis that the suit was one arising under the Constitution and Laws of the United States involving the application of Article I, Section 8 of the Constitution, and 12 U. S. C. A., Section 1464. [R. 4, 23.] The amount in controversy exceeds three thousand dollars. [R. 7.] The notice and petition for removal were served and filed as provided in 28 U. S. C. A. 1446, and such documents, together with the bond required in said section, were duly filed. [R. 9, 23.]

The complaint alleges that the defendant and appellee, the Coast Federal Savings and Loan Association, is a savings and loan association organized under the provisions of 12 U. S. C. A. 1464, and is not authorized under either the state or federal laws to engage in or transact a banking business. At the times alleged in the complaint, the defendant and appellee held itself out and represented to the public through signs on its place of business and advertisements, that it was engaged in the banking business. Such conduct is in violation of the Bank Act of California, which provides a penalty of $100.00 per day for each day of violation, and also provides for the issuance of an injunction to restrain such violation. Judgment was prayed for the penalty of $100.00 per day from November 1, 1948, to the date of entry of judgment, and that the defendant and appellee be permanently restrained and enjoined from holding itself out or doing business as a bank in the particular details prayed. [R. 20-21.] There were attached to the complaint photographs showing some of the violations. [R. 57-64.]

The answer admitted that it was organized as alleged and that it had no certificate to do business as a bank, but alleges further that it did not need any such certifi-

cate and it was not subject to the jurisdiction of the plaintiffs or either of them. It did admit the truth of the photographs which had been attached to the complaint. The appellee alleged it was an instrumentality of the United States Government and that all the acts were done by the defendant by virtue of and under the authority of the Government of the United States. It also alleged that under the laws and regulations of the United States Government administrative remedies and procedures for alleged violations of law by federal savings and loan associations have not been resorted to nor exhausted by the plaintiffs and appellants. It also alleged that any and all acts, advertising and advertisements of the defendant are permitted by the laws of the United States and by the rules and regulations of the Federal Home Loan Bank Board and by the Federal Savings and Insurance Corporation. The answer prayed, in addition, that the plaintiffs take nothing by their suit, that the court decree that federal savings and loan associations are not subject to control and jurisdiction of the appellants, or either of them, and that the court decree that the Banking Code of the State of California, as applied to the defendant and appellee, is in conflict with and subject to the laws of the United States. [R. 24-38.]

Judgment was entered on August 7, 1951. [R. 136.] Within the time allowed by law, the appellants herein filed notice of appeal from such judgment [R. 136-137; Rule 73(a)], together with designation of record [R. 137-139], and statement of points upon which appellants intend to rely. [R. 236-240.]

Jurisdiction of the Court of Appeals is invoked pursuant to 28 U. S. C. A., Section 1291.

II.

Statement of the Case.

This matter was tried and submitted for decision principally upon a written stipulation of facts, with some oral and documentary evidence, and written briefs. Some time thereafter the court rendered its opinion and ordered counsel for defendant to prepare findings of fact and conclusions of law [R. 123], which was done; but the court declined to sign the findings of facts and conclusions of law submitted by defendant's counsel, and subsequently adopted its previous opinion as its findings of fact and conclusions of law and directed that judgment be entered that the plaintiff take nothing and that the case be dismissed. (Despite this fact, appellee requested that the clerk include such rejected findings and conclusions in the transcript of the record [R. 124-134].) The judgment provided further that it was without prejudice to the right of the appellants to pursue and exhaust administrative remedies. [R. 135-136.] Where the facts are sufficiently stated in the opinion, they will be taken therefrom; otherwise, from the stipulation or testimony.

The appellee was chartered by the Home Loan Bank Board under the Home Owners' Loan Act. (12 U. S. C. A. 1464(a).) It is a savings and loan association. It is not authorized by either the State of California, nor the United States to do business as a bank. [R. 107.]

The gravamen of the complaint is that through signs and other means of advertising, the appellee has transacted business in the manner of a bank and has held itself out as a bank or a savings bank, and has led the public to believe that it is such a bank, without authority, and in violation of the state statutes. The appellants further allege that the appellee, unless restrained, will con-

tinue such advertising (and indeed they have, much more flagrantly). The appellants sought injunctive relief, as well as recovery of $100.00 a day statutory penalty. [R. 108.]

Continually, from November 1, 1948 to about March 1, 1949, the appellee made use of office signs at one of its places of business where it transacted business in the County of Los Angeles, having words as a part of said signs and used in such a juxtaposition as appear in Exhibit "A," copies of which are attached to the complaint. Some words were over-emphasized so that the sign seemed to read: "Coast Federal Savings Bank." [R. 94-95; see particularly pp. 59-64.] The over-emphasis in said signs of the word "bank" was called to the attention of the appellee by the appellant and by a representative of the Federal Home Loan Bank Board, and the said signs as set forth in Exhibit "A" were removed and the emphasis placed upon the word "bank" was discontinued. The signs used by the appellee thereafter recited that the appellee was a "Member of Federal Home Loan Bank" without emphasizing the word "bank." [R. 95.]

In the operation of the appellee's business it publishes a house organ which is distributed to its employees, customers and prospective customers. It is known as "Coast Federal's Challenger." It has an average circulation of over 54,000 copies. Photocopies of some of these appear in the Transcript as exhibits. [R. 101.] Particular attention is directed to the bottom of the first column on page 101, wherein it states that the appellee bought the Ninth and Hill Building several years ago as an investment, and that the Federal Reserve Bank then occupied the ground floor. "Now the Federal Reserve Bank has

consented to move to an upper floor, so Coast Federal can have the banking quarters on the main floor, basement and vault." In the issue published a year later (October, 1949) the results of a slogan contest were published, wherein a duplicate first prize was awarded for the slogan, "Our Business Is Banking. Our Banking Is Business. We solicit your banking business." [R. 96-97.] This slogan was not otherwise published in any of the literature, publicity or advertisements of appellee. [R. 98.]

On January 4, 1949, in the "Los Angeles Herald Express," there appeared an advertisement containing the words, "How to open savings account!" [R. 99.] A photostat of the entirety of said advertisement appears on page 102 of the Record. This advertisement was typical of many advertisements running at about that same time, but subsequently the picture and reference to the pass book have been discontinued. On December 27, 1948, in the "Los Angeles Times" appeared an advertisement inviting the public to the opening of Coast Federal Savings. [R. 100.] See particularly the photostat thereof appearing on page 103, wherein it refers to "Coast Federal Savings Bank." It is quite obvious from looking at this advertisement that it was meant to give the impression that the appellee was a savings bank, particularly with the words "Coast Federal Savings Bank" at the side of the advertisement, and the words "Coast Federal Savings" at the top and bottom of the ad.

The Superintendent of Banks of the State of California testified that he heard a radio broadcast the latter part of December, 1948, of the appellee, to the effect of urging the public to deposit their money with Coast Federal Savings and that in that broadcast reference was made

to the banking office of Coast Federal Savings at 8th and Hill. As a result of hearing such a broadcast, the Superintendent of Banks wrote to the President of the appellee, calling his attention to the radio broadcasting referring to the "banking" office. He secured a reply dated January 24, 1949, which stated in effect that they had no record of having used the term, although they had had a previous complaint from the Better Business Bureau concerning the use of the term "banking quarters" in the house organ of the previous October. Although the President stated they had no record of it, he states, "it would be possible that such term was included in padding one of our announcements to fill up the longer time of a commercial on a small station. Since there is no law against it and no misrepresentation it could have gotten by without anyone's thought." [R. 200-202.]

In its various advertising, the appellee used a part of its corporate name, viz.: "Coast Federal Savings." In fact, the only place in any of its advertisements where the type of business conducted by the appellee can be found is on those advertisements (since discontinued) showing an illustration of a "Savings Share Account" pass book, which pass book bears the name "Coast Federal Savings and Loan Association." At all other times and at all other places appears merely the designation, "Coast Federal Savings" without any designation that it is a savings and loan association.

In spite of the statement of the trial court concerning the removal of the signs on the window, wherein the word

"bank" was overemphasized [R. 108-109], the only evidence is that the Superintendent of Banks and the Better Business Bureau did make complaints to the Federal Home Loan Bank concerning the matter, and that the Better Business Bureau had reported to the Superintendent of Banks that although they had made such a complaint, they had not received any support on the matter. At any rate, after the complaint was made by the Superintendent of Banks to the president of the appellee, the president of the appellee informed him that he was making a change. [R. 205-206.]

In 1938 The Federal Savings and Loan Insurance Corporation published a handbook dealing with approved and recommended advertising by insured institutions, including Federal savings and loan associations. (This handbook is not a Federal Regulation.) The handbook approved the use of such phrases as "Accounts Federally Insured", "Insured savings accounts", "Save where savings are insured", and, "Availability of Funds." It stated that earnings distributed should be referred to as "dividends", and not as "interest." Many of the advertisements used by the appellee stated, "Earns interest from the 1st." The trial court stated that this statement was not within the letter or the spirit of one of the regulations. [R. 109.]

At no time did the appellants request or petition the Board for a hearing or other administrative action concerning the appellee, with the exception of the informal complaints, above mentioned. [R. 109.]

III.
Pertinent State Statutes.

The particular provisions of the State law which are applicable are Sections 12 and 12a of the "Bank Act" of 1909 (Deering's General Laws, Act 652), which provisions were codified into Sections 3390, 3391, 3392, 3393, 3394 and 3395 of the Banking Code in 1949. Other existing provisions of the State law were codified in the same code in 1951, which code is now known as the Financial Code. However, neither the number nor the content of the sections were changed in 1951. These sections are as follows:

"3390. Bank or trust business not to be transacted without certificate. No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall solicit or receive deposits, issue certificates of deposit with or without provision for interest, make payments on check, or transact business in the way or manner of a commercial bank, savings bank, or trust company.

"3391. Advertisements, signs, etc., by unauthorized persons. No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall advertise that it is accepting deposits, and issuing notes or certificates therefor, or make use of any office sign, at the place where its business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank or trust company, that deposits are received there or

payments made on check, or any other form of banking business transacted, nor shall any such person make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, or circulars, or any written or printed paper, whatever, having thereon any artificial or corporate name or other words indicating that such business is the business of a bank, commercial bank, savings bank, or trust company, or transact business in such a way or manner as to lead the public to believe that its business is that of a bank or trust company, except to the extent expressly authorized by this code.

"3392. Use of title indicating bank or trust company by unauthorized persons: Building and loan and savings and loan associations. No person which has not received a certificate from the superintendent authorizing it to engage in the banking business shall transact business under any name or title which contains the word 'bank' or 'banker' or 'banking' or 'savings bank' or 'trust' or 'trustee' or 'trust company' and which indicates that such business is the business of a bank or trust company. Any building and loan association or savings and loan association having in its corporate name words not clearly indicating the nature of its business shall state, on all signs, letterheads, and advertising matter, 'This is a building and loan association' or 'This is a savings and loan association' or words to that effect."

"3393. Business which may be transacted by building and loan associations. Any building and loan association may issue shares and investment certifi-

cates and do such other business as may be authorized by the laws of the State relating to building and loan associations, but no building and loan association shall advertise or hold itself out to the public as a savings bank.

"3394. Savings bank business by bank which has not received certificate of authority. No bank which has not received a certificate authorizing it to engage in the savings bank business shall advertise or put forth a sign as a savings bank, or directly or indirectly solicit or receive deposits or transact business in the way or manner of a savings bank, or advertise that it is receiving or accepting savings, or do anything which might lead the public to believe that deposits are received or invested under the same conditions or in the same manner as deposits in savings banks.

"3395. Violation of article: Liability: Injunction proceedings. Any person or any bank violating any provision of the foregoing sections of this article shall be liable to the people of the State in the amount of one hundred dollars ($100.00) a day or part thereof during which such violation continues. Any court of competent jurisdiction in a proceeding brought by the superintendent may enjoin any person from using words in violation of the provisions of this article or from transacting business in violation of this code or in such a way or manner as to lead the public to believe that its business is that of a bank, commercial bank, savings bank, or trust company."

Section 3357 of the same code provides as follows:

"3357. Recovery of penalty, liability, or forfeiture: Disposition of fund recovered: Compromise of pecuniary penalty: Acceptance of less amount. Whenever by the terms of this code a penalty, liability, or forfeiture is imposed, such penalty, liability, or forfeiture shall be recovered in an action brought at the request of the superintendent, by the Attorney General, in the name of the people of the State, and the sum recovered shall be paid into the State Banking Fund and used in payment of claims against such fund. Any pecuniary penalty incurred by any bank or person because of violation of any provision of this code may be compromised and a less amount than that prescribed by this code may be accepted by the superintendent at any time prior to the institution of action to recover the same."

IV.

Specification of Errors.

1. The district court erred in holding that a privately owned, federally chartered savings and loan association doing business for profit is an instrumentality of the federal government. The district court assumed and conceded that such an association was an instrumentality of the federal government and predicated its decision upon this false premise.

2. The district court erred in holding that a privately owned, federally chartered savings and loan association doing business for profit in California is exempt from

complying with the laws of the State of California; and by such exemption can hold itself out as a bank contrary to its own organization and contrary to the laws of the State of California.

3. The district court erred in holding that the sovereign State of California does not have the inherent right to enforce its own laws as to privately owned, federally chartered savings and loan associations doing business for profit in California, such laws not being in conflict with federal laws or regulations.

4. The district court erred in holding that the Home Loan Bank Board has primary jurisdiction over privately owned, federally chartered savings and loan associations doing business for profit in California, when such association, contrary to its own organization, and contrary to the laws of California, holds itself out to the public as a bank.

5. The district court erred in holding that the courts of the State of California have no jurisdiction to enforce the provisions of the banking laws of the State of California as to a privately owned, federally chartered savings and loan association, doing business for profit in California, when such banking laws provide that only State or federal chartered banks may hold themselves out as banks.

6. The district court erred in holding that upon removal of an action from a State court to a federal court, the federal court must dismiss the proceedings where

it is clearly shown that a privately owned, federally chartered savings and loan association, doing business for profit in California, was holding itself out as a bank, contrary to the banking laws of the State of California.

7. The district court erred in holding invalid the banking laws of the State of California, which laws are not contrary to any federal or state law or regulation, and which laws provide in effect that only legally chartered state or federal banks may hold themselves out as banks.

8. The district court erred in holding that a privately owned, federally chartered savings and loan association, doing business for profit in California, need not comply with the state laws of the State of California, which laws are not in conflict with federal laws or regulations.

9. The district court erred in holding that the State of California may not bring an action against a privately owned, federally chartered savings and loan association, operating for profit in the State of California for violation of a State statute, without first having applied to the Federal Home Loan Bank Board for such relief.

10. The district court erred in holding that the doctrine of exhaustion of administrative remedies applied to the State of California, with reference to a violation of the banking laws of the State of California, by a privately owned, federally chartered savings and loan association, doing business for profit in California, which association was and is holding itself out as a bank.

ARGUMENT.

A.

A Privately Owned, Federally Chartered Savings and Loan Association Doing Business for Profit in California Is Not an Instrumentality of the Federal Government.

One of the basic errors committed by the district court was its assumption that a privately owned, federally chartered savings and loan association, organized for profit, was an instrumentality of the United States. The district court in its opinion, says it is conceded that such an association is an instrumentality and agency of the United States. [R. 110.] This statement is not true, and, on the contrary, has no foundation whatever. In the footnote to the opinion [R. 122], the district court says: "The concession must be made," and then cites cases. The appellee, Coast Federal Savings and Loan Association, is a privately owned saving and loan association, which has been issued a corporate charter pursuant to the Home Owners' Loan Act. It is organized for private profit and doing business in the State of California. Indeed, the very complaint is that its business methods and methods to attract business are contrary to state law—by signs and advertising it is holding itself out as a bank or a savings bank. The appellee seeks to avoid complying with the state laws requiring it not to hold itself out as a bank by contending in this proceeding that it is a federal instrumentality. Similar contentions have been made in previous cases and the contentions have been stricken down by the United States Supreme Court beginning as early as the cases of *Thompson v. Union Pacific R. Co.,* (1870) 9 Wall. 579, 19 L. Ed. 792, *Union*

Pacific Railroad Co. v. Piniston (1873), 18 Wall. 5, 21 L. Ed. 787, wherein the Union Pacific Railroad sought to escape taxation by a state on the contention that it was a corporation created by Congress and was an agent of the general government designed to be employed and actually employed in the legitimate service of the government, both military and postal. The United States Supreme Court, however, held that it did not secure such immunity from state laws by virtue of its being incorporated by an act of Congress and acting as agent for the federal government.

The principle stated in these cases was reaffirmed many times by the United States Supreme Court. In *Metcalf & Eddy v. Mitchell,* (1926), 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, Metcalf & Eddy, a firm of consulting engineers, were professionally employed to advise states or subdivisions of states with reference to proposed water supply and sewage disposal systems. They contended that upon that basis they were exempt from payment of federal income tax. (This was for the year 1917.) The Supreme Court, with reference to the rule concerning instrumentalities of either the state or federal government, laid down the following rule (at p. 174):

> "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws (Collector v. Day; Dobbins v. Commissioners of Erie County, *supra*), its obliga-

tions sold to raise public funds (Weston v. City Council of Charleston, *supra;* Pollock v. Farmers' Loan & Trust Co., *supra*), its investments of public funds in the securities of private corporations, for public purposes (United States v. Railroad Co., *supra*), surety bonds exacted by it in the exercise of its police power (Ambrosini v. United States, *supra*), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it (Pollock v. Farmers' Loan & Trust Co., Gillespie v. Oklahoma, *supra*), and forbids an occupation tax inposed on its use (Choctaw, O. & Gulf R. R. Co. v. Harrison, *supra*). And see Dobbins v. Commissioners of Erie County, *supra.*

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule."

In the case of *Clallam County v. United States,* (1923), 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the State of Washington sought to levy a tax on the property of the Spruce Production Corporation, which was organized by the United States as an instrumentality for carrying on the war. All of its property was conveyed to it by, or bought with money coming from, the United States and was used by it solely as a means to that end. When the war was over it stopped its work

except so far as it found it necessary to go on in order to wind up its affairs. The corporation was solely owned by the United States. Immunity from the tax was claimed under the Constitution of the United States in the case of *McCulloch v. Maryland* (1819), 4 Wheat. 316, 4 L. Ed. 579. On the other hand the state claims the right to tax on the ground that the taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. The court held, however, that in their opinion, when the agent was created and all the agent's property was acquired and used for the sole purpose of producing a weapon for war, that the means could not be taxed. The court stated (p. 345):

> ". . . This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States."

In *Capital Buliding and Loan Assoc. v. Kansas Commission* (1938), 148 Kans. 446, 83 P. 2d 106, 118 A. L. R. 1212, it was contended that a building and loan association organized under Kansas law and which was a member of a federal home loan bank, was thereby a federal instrumentality and exempt from making contributions to the Unemployment Compensation Fund. The

court, however, held that a private corporation, organized for private profit, although a member of the Federal Home Loan Bank, was not a federal instrumentality and exempt from payment of the tax. The three building and loan associations involved in the litigation contended that by virtue of their stock ownership and their consequent membership in its corporate entity, they themselves became federal instrumentalities. They were aided and abetted in this position by the rules promulgated by the Internal Revenue Department to guide its revenue collectors, which provided in part that building and loan associations, savings and loan associations, cooperative banks and so forth, chartered by the various states which are members of the Federal Home Loan Bank System are instrumentalities of the United States and are exempt from payment of tax under certain sections of the Social Security Act. The court, however, pointed out that it may readily be admitted that the Federal Revenue Department is staffed with competent lawyers and that the department's opinions are entitled to respect and consideration; but those opinions are *ex parte* opinions and did not have the convincing weight of adjudications arrived at in sharply contested judicial proceedings. The court, in a carefully considered opinion, reviews both criminal and civil cases upon the subject, including those cited hereinabove.

In speaking of the definition of "federal instrumentality" the Kansas court stated:

> "The term 'Federal instrumentality' is not defined in our statutes, but it is a common one in the law books. An instrumentality is anything used as a means or agency. 32 C. J. 947. Therefore a Federal instrumentality is a means or agency used

by the Federal government. In the law books, the terms 'Federal agency' and 'Federal instrumentality' are used interchangeably. Thus in 2 Cooley on Taxation (4th Ed.) 1300, it is said:

"'A corporation cannot escape state taxation merely because it was created by the Federal government, nor because it was subsidized by it, nor because it is employed by the Federal government, wholly or in part, unless it is *really an agency or instrumentality for the exercise of constitutional powers* of the United States.'" (Emphasis added.)

In *Unemployment Compensation Commission of North Carolina v. Jefferson Standard Life Insurance Co.* (1939), 215 N. C. 479, 2 S. E. 2d 584, a similar problem arose wherein the Jefferson Standard Life Insurance Co. contended it was a federal instrumentality and exempt from unemployment taxes by virtue of the fact that it was a member of the Federal Home Loan Bank of Winston-Salem. This case cited *Capital Building and Loan Association v. Kansas, supra* (148 Kans. 446), *Metcalf & Eddy v. Mitchel, supra* (269 U. S. 514), *Clallam County v. United States, supra* (263 U. S. 341) and several other cases. The court held that in view of the restricted meaning which has always been given the term "federal instrumentality," it seems doubtful whether at any time in the history of our highest court a private insurance corporation owning stock in a federal home loan bank would have been considered a "federal instrumentality"; certainly the possibility of such a determination today, in the light of the recent cases touching upon the subject, is extremely remote.

To like effect, see *In re N. Y. Joint Stock Land Bank of Rochester* (1942), 263 App. Div. 1036, 33 N. Y. Supp. 2d 434.

The case of *Federal Land Bank of St. Louis v. Priddy* (1935), 295 U. S. 229, 55 S. Ct. 705, 79 L. Ed. 1408, is cited in numerous of the cases discussed above. The case involved an attachment which had been levied against the Federal Land Bank of St. Louis and the question to be determined was whether or not the land bank was immune (as a sovereign) from judicial process. The court pointed out that it should be borne in mind that federal land banks, although federal instrumentalities, possess some of the characteristics of private business corporations and that the statute does not contemplate that their stock is to be wholly or even chiefly government owned. They have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose. The court pointed out that the implications in the act find support also in the fact that the remedies afforded by the Federal Farm Loan Act to creditors of federal land banks are identical with those given to creditors of joint-stock land banks. Joint-stock land banks are privately owned corporations organized for profit to their stockholders through the business of making loans on farm mortgages. There is nothing in their organization and powers to suggest that they are governmental instrumentalities. In view of the character of joint-stock land banks there is no ground for supposing that Congress intended to render their property immune from seizure by judicial process and thus to make a receivership, if permitted by the Farm

Credit Administration, the sole means of compelling payment of judgments against them. The court, in a footnote, called attention by way of comparison, to the acts creating some of the various federal corporations, including the Home Owners' Loan Corporation.

In this connection it will be observed that the statute creating the Home Owners' Loan Corporation specifically provides that *such corporation* shall be an instrumentality of the United States (12 U. S. C. A., Sec. 1463(a).) However, the section which authorizes the incorporation of federal savings and loan associations (12 U. S. C. A. Sec. 1464), contains no such provision.

In *First Federal Savings and Loan Assoc. v. Johnson* (1942), 49 Cal. App. 2d 465, 122 P. 2d 83, the district court of appeal *stated* that for the purpose of the appeal it would concede that the plaintiff was an instrumentality of the federal government for the purpose of loaning its money advanced to relieve financially distressed owners of farms and homes, pursuant to the Home Owners' Loan Act of 1933. However, in the decision, the court points out that the statute (12 U. S. C. A. 1463(a)), specifically declares that the Home Owners' Loan Corporation is an instrumentality of the federal government, but the section (12 U. S. C. A. 1464) which authorized the creation of federal savings and loan associations did not state that such associations were instrumentalities of the federal government, although it was so specifically declared with reference to the Home Owners' Loan Corporation, itself. In that case, the association contended that it was exempt from taxation by the State of California by reason of the fact that it was granted a charter by the government. The court, however, specifically

held that such an association was not exempt from state taxation.

There are innumerable cases holding that certain agencies and corporations, both publicly and privately owned, are instrumentalities of the United States. Likewise, there are innumerable cases holding that private corporations, chartered pursuant to an act of Congress, are not federal instrumentalities. Many cases give lip service to the proposition that a federal savings and loan association is a federal instrumentality, but actually hold to the contrary. For example, in *State v. Minnesota Federal Savings and Loan Association* (1944), 218 Minn. 229, 15 N. W. 2d 568, 573, the Supreme Court of Minnesota said that a savings and loan association incorporated under the federal law is an instrumentality of the United States, but the effect of its decision is to the contrary. On the other hand, in *Waterbury Savings Bank v. Danaher,* 128 Conn. 78, 20 A. 2d 455, the court said and held that a federal savings and loan association was an instrumentality of the federal government. In this case the court held that a federal savings and loan association was exempt from state taxation but that a state building and loan association that was a member of the Federal Home Loan Bank was not exempt from state taxation.

There are numerous other cases where a court labels an institution as an instrumentality of the United States or as an instrumentality of the state, or as not an instrumentality of the United States. There does not appear to be any case which sets out the principles upon which it may be determined what constitutes an instrumentality. Furthermore, the fact that the court places such a label upon an organization does not appear to have any significance in the result of the particular litigation.

That, we believe, is precisely the point in this case. The appellants believe that the appellee is not an instrumentality of the United States, but regardless of the attitude of the court on this question, the appellee nevertheless is subject to the laws of the State of California.

Some of the attributes of a corporation that is truly an instrumentality of the United States would be that its capital stock is owned by the United States, all of its employees are engaged by the United States, it has free use of the United States mail, its funds are public funds, and it is not organized for private profit. These distinctions were pointed out in *Walker v. Home Owners' Loan Corporation,* 29 Fed. Supp. 589; *Henson v. Eichorn,* 24 Fed. Supp. 42, and *United States v. Doherty,* 18 Fed. Supp. 793. In *Inland Waterways Corporation v. Hardee,* 100 F. 2d 678, it was pointed out that creation by acts of Congress granted no governmental immunity.

In *National Bank v. Kentucky,* 9 Wall. 353, 19 L. Ed. 701, in discussing the question of a federal instrumentality having governmental immunity, the court stated (pp. 361-362).

> "But it is argued that the banks being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of McCulloch v. The State of Maryland, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by

which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. *They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to*

be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." (Emphasis added.)

The instant case is parallel to the case of *State v. Peoples National Bank,* 75 N. H. 27, 70 Atl. 542, where the defendant, National Bank, was convicted of violating a state law in holding itself out as a savings bank. It was held that a national bank was subject to the state law providing that no person shall advertise or hold itself out as a savings bank except a savings bank incorporated in the State of New Hampshire. The purpose of the act was to prevent the obtaining of money or deposits upon a false representation that any person or organization was a savings bank subject to the laws and supervision of the State of New Hampshire.

In *Anderson National Bank v. Luckett* (1944), 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692, the Supreme Court held that a national bank was subject to state laws unless those laws infringed the national banking laws or imposed an undue burden upon the performance of the bank's functions. One of the questions for decision was whether the statute as applied to deposits in a national bank conflict with the national banking laws or is an unconstitutional interference by the state with the appellants' operations as a banking instrumentality of the United States. The bank contended that the State law was an unconstitutional interference with the federally authorized function of national banks as instrumentalities of the federal government. However, the court held (p. 247):

". . . But the statute does not discriminate against national banks, *cf.* McCulloch v. State of

Maryland, 4 Wheat. 316, 4. L. Ed. 579, by directing payment to the state by state and national banks alike, of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes. *Cf.* Davis v. Elmira Sav. Bank, 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700.

"This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." (Emphasis added.)

The argument presented by the appellant in the *Anderson* case is precisely the position taken by the appellee in the present case: That to require a federally chartered corporation, privately owned and doing business for profit to conform to state laws would impose upon them undue restrictions and burdens. This position is answered in the *Anderson* case.

The California statute requiring the appellee to advertise and hold itself out to the public exactly for what it is—a federal savings and loan association—and to restrain advertising or holding itself out to the public as a bank, can not by any possible interpretation be deemed any burden or interference with the federal regulations and statutes concerning the creation or operation of a federal savings and loan association. There is no conflict between the federal and the state statute on the point.

The real question here is not whether Congress may safeguard federal savings and loan associations against ordinary state legislation of a discriminatory character; but whether Congress, by the mere authorization of the

incorporation of a privately owned, federally chartered savings and loan association, has thereby prohibited the exercise of ordinary governmental powers of a state. Did Congress, by authorizing the creation of the Federal Savings and Loan Association, thereby impliedly grant such associations complete immunity from all state control?

It is fundamental, under our dual system of government, that the nation and the state are supreme and independent, each within its own sphere of action, and that each is exempt from the interference or control of the other in respect to its governmental powers, and the means employed in their exercise. Except as otherwise provided by the Constitution, the sovereignty of the state can be no more invaded by the action of the general government, than the action of the state government can be arrested or obstruct the course of the national government. (*Worcester v. Georgia,* 6 Peters. 515, 8 L. Ed. 483.)

The corporation now before this court is a privately owned, though federally chartered corporation, doing business for private profit in the State of California. It cannot be regarded as performing the functions of the government. Unless the state has forfeited its police powers and inherent right to enforce its own laws, such could only be accomplished by complete disregard of the 10th Amendment to the United States Constitution. This privately owned corporation must be held subject to the laws of the State of California.

However, without denying the power of Congress to remove a corporation organized under federal law entirely from state control, it has been recognized that in order to accomplish this end, the language relied upon would have to be expressed so clearly as to make the intention unquestionable. (*Smyth v. Ames,* 169 U. S. 466.) In *Reagan v. Mercantile Trust Company,* 154 U. S., 413, 14 S. Ct. 1060, 38 L. Ed. 1028, it was contended that a corporation organized under the laws of the United States, from that fact alone was not subject to control by the state. In refusing such a contention, the court said at page 417:

> ". . . Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to the business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and *other police regulations.*" (Emphasis added.)

Congress, in authorizing the creation of federal savings and loan associations, has not removed such corporations from the control of the state in which it functions. The silence of Congress in this respect must be regarded as satisfactory assurance that its intention that such corporations should be subjected to police regulations exercised by the state over such business.

B.

The Doctrine of Exhaustion of Administrative Remedies Has No Application in the Present Proceeding.

The district court held there was no jurisdiction, either in the district court or in the superior court of the state by reason of the doctrine of exhaustion of administrative remedies. The district court ordered the case dismissed without prejudice, however, to the rights of the appellants to pursue administrative remedies. However, administrative remedies and the doctrine of exhaustion of administrative remedies are not involved in this proceeding in any way whatsoever—there are no administrative remedies, either provided or applicable to the present proceeding. The State of California is merely endeavoring to enforce the state laws of California and is not attempting in any way to by-pass, hinder, or impede the jurisdiction of any governmental agency.

One of the leading cases in the United States on the doctrine of exhaustion of administrative remedies, is *Myers v. Bethlehem Shipbuilding Corp.,* (1938), 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638. One of the leading cases in the State of California, and which follows the *Myers* case, is *Abelleira et al., v. District Court of Appeal* (1941), 17 Cal. 2d 280, 109 P. 2d 942. In the *Myers* case, the Supreme Court held as follows (p. 50):

> "Third. The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold

would, as the government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

In the *Abelleira* case, *supra* (17 Cal. 2d 280), the Supreme Court of California states the rule very briefly and discusses the federal cases. It states at page 292, that the doctrine of exhaustion of administrative remedies is that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act."

The fundamental premise of the doctrine of exhaustion of administrative remedies, is that there must be a "prescribed administrative remedy." The doctrine is not applicable unless there is an administrative remedy provided by law (or valid regulations).

In the instant case there is no administrative remedy of any kind whatsoever provided either by the acts of Congress or by the regulations of various governmental agencies. A careful examination of the federal regulations relating to the Federal Savings and Loan System reveals that there are no administrative remedies of any kind whatsoever provided for the instant case.

The district court in attempting to justify its action lifted out of context certain provisions of Section 142.2 of Title 24 of the Code of Federal Regulations. Section 142.2 *in toto* provides:

> "142.2 *Hearings.* Any person who has made an application or petition to the Board pursuant to any provision of Parts 143, 144, 145, or 146 of this subchapter may request a hearing thereon, provided such application or petition has been denied or disapproved by the Board. At any time after the filing of any such application or petition and before consideration thereof by the Board, any interested person may request a hearing upon such application or petition. The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any request therefor has been made by any person. The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists."

It will be observed that the administrative hearing provided for in the regulations relate to matters under

parts 143, 144, 145 and 146. Part 143 of the regulations specifically relates to the incorporation, organization and conversion of a savings and loan association. Part 144 relates particularly to the charter and by-laws. Part 145 relates to operations, and part 146 to merger, dissolution and reorganization. It would be anticipated that if there is any regulation it would be found in part 145 relating to operations, but an examination of the numerous sections of Sections 145.1 to 145.27 reveals that there is no provision whatever which in any way comes close to the present situation. Part 145, relating to operations, relates particularly to the capital of a savings and loan association, the loans it may make and may not make, other investments, brokerage business and the sale of loans, fidelity bonds required of directors, etc., the location of its home and branch offices, etc., fiscal agents for federal instrumentalities, book value of assets, records and reports, and particularly the accounting, annual reports, monthly reports and statement of condition, examinations and audits and annual meeting of members. It contains nothing whatever concerning how a savings and loan association shall hold itself out, either as a savings and loan association, or as a bank. The only rule to be found upon this subject matter, is also found in the Act of Congress (12 U. S. C. A. 1464), that a federal savings and loan association shall include in its corporate title the words "federal savings and loan association." No word will be found anywhere whatever in the federal regulations relating to advertising or holding out by a federal savings and loan association.

Just because the federal regulations are particularly voluminous, not only as to federal savings and loan as-

sociations, but also other matters, is no reason to assume that a federal regulation covers every detail of operation from stockholders' meeting to janitorial services.

The action in the instant case is to enforce the provisions of the state laws as provided by the bringing of an injunction by the Attorney General and for penalties. It is inconceivable that a federal agency could award an injunction to restrain the continued violation of the state law and to award or enter a judgment for penalties as provided in the state statute for violation of the state law. It is conceivable, however, that the Federal Home Loan Bank could make regulations, which regulations would provide that a federal savings and loan association shall hold itself out to the public as a federal savings and loan association and shall not, by any means, hold itself out or attempt to hold itself out, either as a bank or as anything other than a federal savings and loan association. However, such regulations have not been promulgated. It is therefore respectfully submitted that the doctrine of exhaustion of administrative remedies has no application to the instant case.

The use of the doctrine of administrative remedies to the instant case is comparable to a situation where a physician and surgeon is licensed by the Board of Medical Examiners which has power to suspend or revoke the license for certain misconduct, and where it is contended in a prosecution, either in a state court for violation of the State Narcotic Act, or in federal court for violation of the Harrison Narcotic Act, or for some other

similar offense, that the prosecution of such an offense is barred by failure to bring a proceeding before the Board of Medical Examiners to suspend or revoke his license.

The Federal Food, Drug and Cosmetic Law has for years provided for a hearing before the appropriate federal department. If, at the hearing, it appears that there has been a violation of the statute, the department is required to certify the matter to the District Attorney without delay. It is established, however, that the failure to hold such a hearing does not bar a prosecution. (*United States v. Morgan* (1911), 222 U. S. 274, 32 S. Ct. 81, 56 L. Ed. 198; *United States v. Dotterweich* (1943), 320 U. S. 277, 64 S. Ct. 134, 88 L. Ed. 48.) The doctrine of exhaustion of administrative remedies was not called such by name in those proceedings, but the distinction is there just the same—there was a violation of the statute which could be enforced only in a court of competent jurisdiction. Thus, in the instant case there is a violation of a state statute which can be enforced only in a court of competent jurisdiction.

By the same specious reasoning of the trial court, every person (private or public) who has any cause of action against a federal savings and loan association, whether it be for breach of contract, eminent domain, or a cause arising from the negligent operation of a motor vehicle, would be required to pursue the claim before the Federal Home Loan Bank Board before filing suit.

C.

The District Court Erred in Holding That the State Laws Forbidding Anyone Except the Bank From Holding Themselves Out as a Bank, Is Unconstitutional.

The district court held that Congress, by its drafting of 12 U. S. C. A. 1464, had preempted the field, making invalid the state statute as to a federal savings and loan association. An analysis of the statute shows that this is not correct.

The principle of law concerning an act of Congress preempting the field, thus making any state statutes on the subject matter invalid, has been set forth recently by the United States Supreme Court in *Bethlehem Steel Co. et al. v. New York State Labor Relations Board* (1947), 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, and *Amalgamated Association, etc. v. Wisconsin Employment Relations Board* (1951), 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 383. In the *Bethlehem Steel Co.* case, the Supreme Court stated the principle as follows (67 S. Ct. 1027, 1030-1031):

> ". . . When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482. In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon

the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission, 297 U. S. 471, 56 S. Ct. 536, 80 L. Ed. 810. Welch Co. v. New Hampshire, 306 U. S. 79, 59 S. Ct. 438, 83 L. Ed. 500. But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. Napier v. Atlantic Coast Line R. Co. 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432. However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 34 S. Ct. 829, 58 L. Ed. 1312, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation. Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission, *supra;* Welch Co. v. New Hampshire, *supra.* The states are in those cases permitted to use their police power in the interval. Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen, 318 U. S. 1, 63 S. Ct. 420, 87 L. Ed. 571. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the

character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; compare Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482, with Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315; cf. Mintz v. Baldwin, 289 U. S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

"It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the latter class. There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. Soss Manufacturing Co., 56 N. L. R. B. 348. It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. Maryland Drydock Co., 49 N. L. R. B. 733. We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.

"Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary con-

trol over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. Cf. Matter of Creamery Package Mfg. Co., 34 N. L. R. B. 108; Wisc. Emp. Rel. Bd. Case III, No. 348 E-117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition * * *.'"

In the *Amalgamated Association* case, *supra* (340 U. S. 383), the Supreme Court followed and referred to the *Bethlehem Steel* case and pointed out that Congress was cognizant of the policy questions before the court, and when it amended the act in 1947 it referred to the decision in the *Bethlehem Steel* case and demonstrated that it knew how to cede jurisdiction to the state. "Congress knew full well that its labor legislation pre-empts the field that the act covers insofar as commerce within the meaning of the act is concerned, and demonstrated its ability to spell out, with particularity, those areas in which it desired state regulations to be operating. The court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted, and declare invalid *state regulation which impinges on that legislation.*" (Emphasis added.)

It will be observed from an examination of the two cases quoted from above, that the cases advancing the doctrine of a congressional act pre-empting the field,

arise under the commerce clause of the Constitution, affecting either public utilities or labor legislation.

Furthermore, all of the cases are cases where the states sought to regulate the particular business. In the instant case there is no attempt by the state, either to supervise the operation or to regulate the operation of a federal savings and loan association. The state law applies to all, whether an individual, a domestic corporation, a state building and loan association, or a federal savings and loan association—that no one who does not have a certificate of authority to do business as a bank shall hold itself out as a bank. Under no stretch of the imagination can it be contended that such a statute impinges upon the act of Congress authorizing the incorporation of federal savings and loan associations.

In *Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania* (1943), 318 U. S. 261 63 S. Ct. 617, 87 L. Ed. 748, the validity of the State Milk Control Act as it affected a public contract for the Army was questioned. The Supreme Court held that the state law was valid. In so doing, the Supreme Court stated as follows (63 S. Ct. 617, 623-624):

> ". . . An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, United States v. Borden, 308 U. S. 188, 198, 199, 60 S. Ct. 182, 188, 84 L. Ed. 181; United States v. Jackson, 302 U. S. 628, 631, 58 S. Ct. 390, 392, 82 L. Ed. 488; Posadas v. National City Bank, 296 U. S. 497, 503, 505,

56 S. Ct. 349, 352, 353, 80 L. Ed. 351, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

"Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

It certainly cannot be seriously contended that if the Federal Savings and Loan Association is required to hold itself out to the public as a federal savings and loan association (and not as a bank), that the federal purpose for authorizing the creation of such associations will be frustrated. If Congress had intended these organiza-

tions to be banks, it can be assumed that Congress would have so stated. Instead, Congress specifically said they shall be known as "federal savings and loan associations." Certainly, it cannot be contended that their purpose would be frustrated if they were required to do business and represent themselves under their true name and character. There can be no possible conflict between the state statute and the act of Congress and the regulations of the Home Loan Bank Board. The Home Loan Bank Board will not be prevented in any way from carrying out its governmental function of providing for uniform operation and regulation of federal savings and loan associations throughout the United States; unless of course, it is the intention of the Home Loan Bank Board to pass a regulation to the effect that the Federal Savings and Loan Association may hold itself out as a bank. If this ever happens, then there will be a direct conflict with the regulation and the state law. Furthermore, if this ever happens, there will be a direct conflict between the regulation and the act of Congress, but that has not happened and it is not conceivable that it will happen.

If Congress had intended to pre-empt the field, we believe it would have said so in so many words. On the contrary, Congress has authorized the Home Loan Bank Board to issue charters under certain conditions to federal savings and loan associations, to supervise such associations, and to make rules and regulations relative thereto. The same act permits state building and loan associations and insurance companies to become members of the Federal Home Loan Bank. The act also permits, under certain circumstances, for a state chartered association to be converted into a federally

chartered association. Under the circumstances set out in this statute there is no indication whatever that it was the intention of Congress to pre-empt the field. This is not a field involving the commerce clause of the Constitution, nor the federal labor policy.

The position of the district court seems to be that Congress, in enacting the Home Owners' Loan Act, has pre-empted the field, and therefore, a federal savings and loan association need not comply with any provision of the state law. This is not a correct assumption. Even federal employees discharging their federal duties, are required to obey the state laws.

The principle that federal employees must obey state laws has been pointed out at great length, and the history thereof discussed in *People v. Don Carlos* (1941), 47 Cal. App. 2d 863, 117 P. 2d 748, which holds that a federal employee must obey the state laws or the particular city ordinances in the performance of his federal duties. In that case a bus driver who was hauling twelve sacks of mail on San Fernando Road, was convicted of speeding. He sought to show the time the mail was due, but the court held that regardless of the time the mail was due, he was required to obey the speed laws. See also to like effect: *Hall v. Commonwealth,* 129 Va. 738, 105 S. E. 551. It is submitted that these cases aptly illustrate that even a federal officer or employee, performing his duties is amenable to the state laws, although the state may not require from him a license or an examination.

In *Johnson v. Maryland,* 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126, the driver of a mail truck for the United States Post Office Department, was held to be exempt

from securing a driver's license before driving a vehicle on the state highway. That case, and the companion cases, completely illustrate the position of the appellant in this proceeding. The appellent does not contend that the appellee must secure certificate of authority, charter, permit or license in the State of California, or is under the supervision of any branch thereof. The appellant contends that the appellee must obey the laws of the State of California. In *Johnson v. Maryland* it was pointed out that the State of Maryland could not require the driver of a mail truck to secure a license from the State of Maryland before driving a mail truck on the state highways; but an employee of the United States does not secure a general immunity from the state laws while acting in the course of his employment.

The case clearly emphasizes the distinction which the appellants are endeavoring to point out. While the state cannot force the postal delivery man to obtain a license, yet, that same postal delivery man is subject to, bound by, and forced to comply with, all state and municipal ordinances and regulations in the operation of such automobile. He is bound by the state speed limit, and subject to arrest if he exceeds it. He is bound by the municipal traffic signals and subject to arrest if he violates them. The state does not need to ask the Post Office Department to enforce the state laws—the state may (and is expected to) enforce such laws itself.

The state law of California requires that no one use the word "bank" or "banking" in its name or advertisement, unless it is in fact a state or nationally chartered bank. The state law further requires that all state building and loan associations, and all federally

chartered savings and loan associations, clearly indicate in their advertising that they are building and loan or savings and loan associations. Such field has not been pre-empted by the federal government or federal regulations, and in this action the appellants are but seeking to compel the appellee to comply with the state law in such regard. The above-referred to postal employee is subject to fine if he violates traffic ordinances. The appellee herein is subject to a penalty if it has violated the state law. Clearly, the appellee has violated the state law in over-emphasizing the word "bank" in its building sign, by making its place of business appear to be "COAST FEDERAL SAVINGS BANK." This, it has done only for one purpose, to indicate to the public that it is a bank. It is uncontradicted that the appellee also referred to its place of business as "banking office" in its radio advertising.

It will also be noted that in the appellee's newspaper advertising it also emphasized the word "bank." Its newspaper advertisement of December 28, 1948, attached to the stipulated statement of facts, particularly emphasizes the word "bank"; and in no place in such advertisement does it appear that the appellee is a savings and loan association. The appellee merely refers to itself as "Coast Federal Savings" and emphasizes the word "bank." The only purpose and result of this would be to indicate that the appellee is a savings bank.

It will be further noted that the appellee even paid $25.00 to a slogan contributor for contributing the slogan: "Our Business is Banking. Our Banking is Business. Do Your Banking Business With Us." This slogan was selected by the appellee as the most appropriate to the appellee in its business.

The appellee continuously advertised itself as "Coast Federal Savings" without using the balance of its corporate name or otherwise showing that it is a savings and loan association. The evidence shows that the Better Business Bureau of the City of Los Angeles attempted to get the appellee to correct the situation herein complained of. The mere fact, alone, that the Better Business Bureau requested the appellee to desist from such misleading advertising is proof quite in itself that at least some portion of the public found such advertising to be misleading and indicated that the appellant was doing a banking business.

The officials of the Better Business Bureau are as much a part of the public as anyone else, and even if it could be assumed that no complaints had come to the Better Business Bureau on the part of others, yet the fact remains that such advertising does indicate that the appellee is engaged in the banking business, all in violation of Section 3392 of the State Banking Code. Furthermore, the mere use of the words "bank" and "banking office" are prohibited by the state law.

Surely no one would contend that the appellee would not be subject to and have to comply with the State Usury Law. Certainly there can be no question but what the appellee corporation, in its operations within the State of California, under such law, could not charge or collect more than the legal rate of interest. There can be no question that the State Usury Law could be enforced by the state. (55 Am. Jur. 328-9.)

Conclusion.

The appellee is a federal savings and loan association, which has been issued a charter by the Home Loan Bank Board pursuant to 12 U. S. C. A. 1464. It is doing business in the State of California for private profit. In the conduct of such business, it holds itself out sometimes merely as "Coast Federal Savings" and at other times as a bank, or refers to its offices as "banking offices." On the other hand the state law specifically provides that no one, and no company, corporation or association that is not issued a certificate of authority from either the state or the federal government to conduct a bank, shall hold itself out to the public as a bank. This law also provides that the people of the State of California, and the Superintendent of Banks may bring a proceeding in a court of competent jurisdiction and secure an injunction from such continued violation and secure a judgment for penalties not to exceed $100.00 a day for each day of violation. This action is the action specifically authorized by the state law. However, the district court has dismissed the proceedings, without prejudice however, as to the right to pursue "administrative remedies." The district court held that this federally chartered, privately-owned and operating for profit, savings and loan association is a federal instrumentality, that no proceedings can be commenced unless administrative remedies have been exhausted, and that Congress has pre-empted the field of legislation and therefore the state statutes are invalid.

The very cases which set up the establishment of the principle of law of Congress pre-empting the field, show that this case is not subject to that principle. Congress has not pre-empted the field.

The courts have given lip service in many cases that any federally chartered corporation is a federal instrumentality, but the cases show that when the term is used in this sense it has no meaning whatever. The cases hold in substance, however, that a federally chartered, privately-owned corporation is amenable to all of the laws of a state, and does not enjoy either the immunity from suit or the immunity from taxes that the federal government, itself, enjoys.

Finally, there is no administrative remedy provided either by the Act of Congress or the Regulations of the Federal Home Owners' Bank Board, and indeed there could not be any, providing for the issuance of an injunction by a court of competent jurisdiction and a judgment for penalties in the sum of not exceeding $100.00 a day. The specific penal provisions of the state law are beyond the realm of any possible or theoretical administrative remedy. The appellants respectfully request that the judgment appealed from be reversed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,

WALTER L. BOWERS,
Assistant Attorney General,

BAYARD RHONE,
Deputy Attorney General,

Attorneys for the Appellants, the People of the State of California and Maurice C. Sparling, as Superintendent of Banks of the State of California.